

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 302 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

RAMILABEN @ RAMIBEN

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KAMLESHKUMAR MAGANLAL PARMAR

Versus

STATE OF GUJARAT

Appearance:

MR YU MALIK for the Appellants.

MR U.A. TRIVEDI, ADDL.PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE A.L.DAVE

Date of decision: 20/06/98

ORAL JUDGEMENT (Per R.K.Abichandani,J.)

The appellants challenge the judgement and order dated 7.4.1989 passed by the learned Additional Sessions Judge, Court No.13, Ahmedabad, in Sessions Case No. 333

of 1988, by which the accused No.1 was found guilty of the offence punishable under Section 302, read with Section 34 of the Indian Penal Code and convicted and sentenced to undergo rigorous imprisonment for life and to pay fine of Rs. 100/-, in default, to undergo further rigorous imprisonment for a period of four weeks, and, the appellant No.2 was found guilty of the offence punishable under Section 302, read with Section 34 of the Indian Penal Code and convicted and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 100/-, in default to undergo further rigorous imprisonment for a period of four weeks, in respect thereof.

Before we proceed further, it may be recorded that earlier by order dated 20.11.1997, on being pointed out by the learned Counsel appearing for the appellant No.1 that she had passed away on 21.4.1994 and on the basis of the death certificate produced by the learned Counsel, which was taken on record, it was ordered that the appeal of the appellant No.1 would not survive and it abates. No application was made as contemplated by proviso to sub-section (2) of Section 394 of the Criminal Procedure Code. Therefore, we have heard this appeal so far as the appellant No.2 is concerned.

The prosecution version is that both the accused were residing just opposite the house of the complainant Ambaben. The accused No.2 was the nephew of accused No.1, who had brought him and kept him as son with her. The complainant's daughter Vimla used to go to the house of the accused to watch television, and tender relationship had developed between Vimla and the accused No.2 - Kamleshkumar Maganlal Parmar. The accused No.1 and 2 therefore, had sought her hand from the complainant, but the complainant not being inclined, stopped Vimla going to the house of the accused persons to watch T.V. The prosecution case is that because the complainant did not agree to the proposal of the accused persons and refused to get Vimla married to Kamleshkumar, the relationship between both the sides got strained. However, the accused kept on insisting that Vimla should be married to the accused No.2. In this background, it is alleged that on 9.7.1988 at about 10.00 A.M when Vimla was alone in her house and her mother Ambaben had gone out from the rear door of the house to see the municipal staff working on the drainage line, her attention was drawn to the smoke coming out of the house and when she came back to the rear door of the house, she found that it was locked from inside. Thereupon, a boy went to call her son Kanu, who came there within five minutes and by

climbing on the roof and using a big stone, he managed to break open the inside chain of the door. As soon as this rear door was so opened, they found Vimla set ablaze trying to come out and she fell down near the step of the rear door. The complainant Ambaben and other witnesses tried to put-off the blaze by covering her with quilts. The complainant's son Kanu, who had entered the house went to the front door and found that it was latched from outside. He therefore came out of the rear door and went and opened the front door from outside and again entered the house. He then went to call for the ambulance and thereafter, borrowing a bi-cycle of a neighbour, went to the Police Station. At the Police Station he was asked to go to the hospital. He however, came back to his house and from there, proceeded to inform his father. According to the prosecution, the girl Vimla immediately on the rear door being broken open, made a dying declaration before her mother Ambaben that the accused No.1 and 2 had entered the house, poured kerosene on her and the accused No.1 had set her on fire. The story of the prosecution is that the accused No.2 had caught hold of Vimla after closing the rear door from inside and the accused No.1 had poured kerosene on her and she set her on fire. Even in the charge which was levelled against these accused persons, the accused No.1 is alleged to have poured kerosene on Vimla and set her on fire, while the accused No.2 is alleged to have caught her after closing the rear door from inside. The accused No.1 had been charged with the substantive offence under Section 302 of the IPC, while the accused No.2 was charged for the offence under Section 302 read with Section 34 of the IPC, in view of this version of the prosecution. According to the prosecution, when Vimla was taken to the hospital around 11.30 A.M, the Medical Officer Dr. Chandarana had recorded the case history and in the case history Ex.25, it was noted that he was informed by Vimla and her mother the complainant about the names of Ramila and Kamlesh Hirubhai as having caused her burning by kerosene. The prosecution relies on this piece of evidence as a dying declaration before the doctor. The prosecution also has heavily relied upon the statement of Vimla recorded by the Police officer in the hospital, which is treated as FIR and dying declaration as per Ex.13. When the condition of Vimla was critical in the hospital, the Police Officer recorded her statement Ex.13 and took an endorsement of the doctor below it that Vimla was not in a position to put her signature below that statement. According to the prosecution, since the Executive Magistrate could not reach in time, the statement of Vimla could not be recorded before the Executive Magistrate. The prosecution also relies on the

dying declaration said to have been made before Kanubhai, the brother of Vimla who had later on gone to the hospital and according to whom when he was alone in the room, Vimla had told him that the accused No.1 and 2 had set her on fire after pouring kerosene.

The defence version of the accused is that they were not in the city on the day of the incident since both of them had gone out. According to the accused No.2, on reading the news he himself surrendered to the Police. The version of the accused No.2 is that he was in love with Vimla and they used to move together, love letters written by her to him and they were photographed together. Photograph and love letters were produced before the Court during the further statement of the accused No.2 recorded under Section 313 of the Code.

Admittedly, there was no eye-witness to the incident and the prosecution has therefore relied upon the dying declarations said to have been made by Vimla before her mother Ambaben, while giving case history to Dr.Chandarana Ex.25 and Dr. Kinar Shah Ex.19 before the Police Officer as per Ex.13 and before her brother Kanubhai.

There can be no dispute about the proposition that a dying declaration would be admissible in evidence under Section 32 of the Indian Evidence Act, and depending on the facts of the case and its genuineness, when proved, can form the sole basis for conviction without independent corroboration. It is also well settled (see State of Gujarat Vs. Khumansingh Karsan Singh, reported in AIR 1994 S.C 1641) that conviction cannot be based on inconsistent dying declarations.

In the dying declaration which is said to have been made before Ambaben, who is examined at Ex.8, Vimla is said to have told her, on being asked as to how did she catch fire, that Ramilaben and Kamleshkumar i.e. the accused No.1 and 2 had set her on fire and run away from the front door. In the case history which was first recorded by Dr. Chandarana at Ex.25, it is stated that Vimla and her mother had informed the doctor that the burning was caused by kerosene by Ramilaben and Kamleshkumar Hirubhai. The name of the accused No.2 is Kamleshkumar Maganlal Parmar and no explanation is forthcoming from any quarter regarding the name "Hirubhai" appearing in Ex.25 after the name of Kamleshkumar. There is no mention of the manner in which the accused had caused the injury and the part played by them individually in the said case history Ex.25. In the case paper at Ex.19 where case history is recorded by the

other doctor after it was recorded in the case paper Ex.25, the names of the accused are not mentioned and it is stated that she was burnt by neighbours by kerosene in the morning as informed by the girl and her mother. The statement at Ex.13 said to have been given by Vimla, on which strong reliance was placed by the prosecution, makes an interesting reading. It is recorded therein by the PSI that Vimla was 16 years of age and that on being asked she was stating that she resided with her parents and that on the morning of that day i.e. 9.7.1988, her neighbours, Ramilaben and her nephew Kamlesh, had come together and Ramilaben had entered her house, poured kerosene over her, set her on fire and went away after closing the door. It is also stated that her nephew Kamlesh had remained outside the house. As regards the motive for the crime she has stated that because she and her mother were refusing to get her married with Kamlesh, she was set on fire. It is also stated by her that when she was set on fire, there was no one else present in the house, though there were neighbours around.

We have seen the original statement Ex.13 and we note that Dr. K.C.Shah has signed initially in blue ink and thereafter, there is an endorsement that the patient cannot put her signature and the signature of Dr. K.C.Shah both in black ink. It is not stated at that place that the patient's thumb mark could not be taken. In other words, the endorsement of the doctor does not mention regarding the thumb mark, but mentions about the signature. Apart from this, the glaring fact that stares from the said statement is that according to Vimla the accused No.2 Kamleshkumar had remained outside the house and it is accused No.1 Ramilaben who alone had entered the house and poured kerosene on her, set her on fire and went away after closing the house. Vimla emphasised that when she was set on fire, no one else was present. This dying declaration Ex.13, clearly rules out the presence of the accused No.2 inside the house and also rules out his having caught hold of after closing the door from inside to facilitate her being set ablaze by the accused No.1 by pouring kerosene and lighting with a match stick.

Now we come to the dying declaration which is said to have been made before the brother of the deceased - Kanubhai. In his deposition Ex.14, Kanubhai (Kannailal Kacharabhai Parmar) has stated that he had opened the rear door of the house by climbing on the roof and by breaking the chain by use of a big stone. He had entered the house and tried to open the front door, which was closed from outside. He therefore went out and opened it and again entered the house. At that time, he had seen

the accused No.1 and 2 locking their house and going away. He had then gone to phone up for the ambulance and again returned to the house. Thereafter, taking the bi-cycle of one Ravjibhai, he had gone to Naranpura Police Station where he was told to go to the hospital. He, however, came back to the house and found that his sister was taken to hospital. Thereafter he went to Mirzapur to inform his father about the incident, who told him to go to hospital and thereafter, he went to hospital. Then comes the deposition of this witness regarding dying declaration. According to him, when he reached the hospital his sister was conscious and when he asked her how did she catch fire, she told him that while she was alone in the house, Kamlesh and Ramilaben had both entered the house and Kamlesh had latched the rear door from inside and then both had caught hold of her and poured kerosene on her, and, Ramilaben had set her on fire and that thereafter, both of them had gone out closing the front door. It will be noted that the part attributed to the accused No.2 Kamleshkumar in this dying declaration does not find place in the dying declaration Ex.13 recorded by the Police Officer in presence of the doctor in which Vimla had clearly stated that the accused No.2 Kamlesh had remained outside the house and it is only the accused No.1 who had entered the house, poured kerosene on her and gone away closing the door after setting her on fire. This is a major discrepancy between these two dying declarations.

Apart from this, the story of the prosecution about these dying declarations being made before the complainant Ambaben and Kanubhai can hardly be accepted on its face value in view of some other important aspects of the matter. It will be noted from the deposition of Ambaben that there were other persons present when she tried to get into the house through the rear door on noticing that smoke was coming out. All these persons waited for nearly five minutes and the rear door was broken open only after her son Kanu came there. As soon as it was opened, according to Ambaben, she asked her daughter Vimla as to how she had caught fire and Vimla told her that the accused persons had set her on fire. If, when admittedly Kanubhai was also present in the house having broken open the rear door, such a dying declaration was in fact made by Vimla, then obviously when he had went to the Naranpura Police Station he would have given the FIR accordingly having come to know about both these persons. The story that names of these two accused persons had given by Vimla as the persons having set her on fire to Ambaben is therefore highly doubtful. Kanubhai does not refer to any such dying declaration

having been made by Vimla before Ambaben. None of the witnesses who were present with Ambaben at that time is examined. In fact, in his cross-examination he has stated that after the rear door was broken open, his sister had not said anything to him or anyone else. As regards the statement said to have been made by Vimla to Kanu in the hospital he has stated that he did not disclose to his mother about that statement. In our view, it is not possible to believe that there was no one around in the hospital room where Vimla was lying in a critical condition. Witness Kanubhai has stated that he does not remember at what time he entered the room where Vimla is said to have been made the statement before him. According to the doctor attending Vimla he was in her room till 12.20 Noon and that he had allowed relatives to come in the room after statement of the girl was recorded as per Ex.13. He had then come back at 1'0 Clock when he found that the girl's condition was critical and she was unconscious at that time. When some one was sent to the doctor who rushed back at 1'0 Clock after he had left the room at 12.20 Noon, it is not possible to believe that during that short interval there was no one in the room with Vimla, who was in a very critical state and was found to be unconscious at 1 '0 Clock and died at 1.30 P.M. The story of Kanubhai that Vimla had made a statement to him implicating these two accused persons when nobody was in the room, is therefore highly improbable.

The other important witnesses who are referred to in the deposition of the complainant Ambaben and Kanubhai and who, according to them, had gathered at the time when the rear door was broken open, have not been examined. It is also pertinent to note that Kanubhai who had seen both the accused going away locking their house at the time when he was entering from the front door did not tell anyone nor did he attempt to stop them, which certainly would have been the case if their names were really disclosed by his sister to the complainant Ambaben as her assailants.

Further more, the conduct of Ambaben, Kanu and others of not trying to enter through the front door which according to the witnesses was closed from outside, when shouts were being raised and smoke was rising from the room, is highly unusual. If the front door was latched from outside, it could easily have been opened and there was no valid reason for the complainant Ambaben and others to wait for full five minutes for her son to come there and break open the rear door. The fact that they were trying to break open the rear door which was

latched from inside indicates that there was no entry possible in the house without breaking open the door. This raises the possibility of Vimla having locked herself in the house.

In view of these facts and circumstances, the story that the boy Kamleshkumar who was deeply in love with Vimla, accompanied by the accused No.1 went to the house of Vimla, poured kerosene over her and set her on fire, is highly improbable. There is nothing to show that the relationship between the boy and the girl were strained at any point of time. In fact, even after the girl was stopped by the complainant from going to the house of the accused No.1 to watch T.V., according to the complainant the accused No.1 Ramilaben had enquired as to why was she not coming. Even the so-called dying declaration Ex.13 shows that according to Vimla the accused No.2 wanted to marry her. Their photograph and love letters were admittedly produced by the accused No.2 during his statement. Even according to Kanubhai because of the love affair that had developed between his sister Vimla and Kamleshkumar, she was not being allowed to go to the house of the accused to watch T.V.

Thus, in view of the fact that there is no consistency in the dying declarations and further that it is doubtful whether any dying declaration was made before the complainant Ambaben or her son Kanubhai and in view of the fact that the so-called dying declaration Ex. 13 recorded by the Police does not implicate the accused No.2 Kamleshkumar who is said to have been standing outside the house and also in view of the fact that the accused No.2 Kamleshkumar had no ill-will against Vimla with whom he wanted to marry, the possibility of the girl Vimla having locked herself inside the house and committing suicide by pouring kerosene and setting herself on fire, cannot be ruled out. The mother, in order to avoid the embarrassment of her daughter having committed suicide because of her having objected to her marriage proposal with the accused No.2 Kamleshkumar, who was of same caste, seems to have implicated the boy who wanted to marry her daughter. In this view of the matter, in our opinion, the prosecution has failed to establish the guilt of the accused No.2 and the accused No.2 deserves to be acquitted. We therefore allow the appeal of the accused No.2 and set aside the conviction and sentence of the accused No.2 imposed by the judgement and order dated 7.4.1989 in Sessions Case No. 333/88. Since the accused No.2 did not report back after being released on furlough on 30.8.1991, there is no question of making an order directing him to be set at liberty

forthwith and the consequences of his not reporting after the furlough period was over, will follow in accordance with law.

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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 302 of 1989

Appeal of the accused No.2 is allowed and the conviction and sentence of the accused No.2 imposed by the judgement and order dated 7.4.1989 in Sessions Case No. 333/88 is set aside. Since the accused No.2 did not report back after being released on furlough on 30.8.1991, there is no order directing him to be set at liberty forthwith and the consequences of his not reporting after the furlough period was over, will follow in accordance with law.

Dt.20.6.98 (R.K.Abichandani,J.) (A.L.Dave).